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ABSTRACT

This document is an updating supplement to a 1973 volume of the same title and is intended to cover the various aspects of court action effecting higher education, and particularly the faculty and staff for the period 1973-76. The areas discussed include the inception of contracts; due process in nonrenewal of nontenure contracts and probationary contracts; tenure, compensation, promotion; discharge for cause, with due process; retirement; sex, race, national origin, and age discrimination; freedom of expression; collective and individual faculty power; collective bargaining; faculty strikes; nonacademic staff members; and the president, administrative staff, and board members. In each area specific cases are cited and precedents set are discussed. (JMF)

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UPDATING SUPPLEMENT TO

The Colleges and the Courts

FACULTY AND STAFF BEFORE THE BENCH

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UPDATING SUPPLEMENT TO

THE COLLEGES AND THE COURTS:

FACULTY AND STAFF BEFORE THE BENCH

M. M. Chambers

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1976

PREFACE

As indicated in its title, this booklet is an updating supplement to a 1973 volume on the same subject. *The Colleges and the Courts: Faculty and Staff Before the Bench* is a 280-page book published by the Interstate Printers & Publishers, Inc., of Danville, Illinois 61832 at $8.75 per copy. Many owners of that volume will have good use for this supplement which carries the story three years forward to 1976.

That circumstance does not prevent this brochure from standing alone. In view of recent and current rates of change in the stance of the courts regarding various aspects of higher education, a three-year slice of current history can convey a good deal of what the law presently is and what it may be becoming, as well as what it once was.

The type of work represented here is not intended solely for legal eagles or other scholars who have mastered the long history of the subject. Rather the aim is to contribute a little toward the extension among many people--students, faculty and staff members, administrators, board members, parents, and the general public--some knowledge of matters that may affect them vitally, and which are pertinent to the advancement of educational justice.

Familiar with the looming rocks in the perilous channel between the Scylla of technical hairsplitting and the Charybdis of oversimplification, one can only try to steer a course that avoids such dangers. Another restraint in this case is the necessity and desirability of brevity. If the discourse is so curt as to be cryptic and too often incomprehensible to the intelligent reader, or if too many issues of real importance have been omitted, the object has not been attained. Readers will adjudge that.

For the convenience of readers of both the original *Faculty and Staff Before the Bench* and of this present *Updating Supplement*, the sequence of numbered sections herein is nearly the same as that of the numbered chapters in the larger book. However, even over as short a period as the intervening three years, the rap of the judicial gavel has brought a few changes among the topics stressed.

For example, Chapter 9, which dealt with "The Loyalty Oath Furor," disappears because that issue is now dead or dormant. In its place appears Section 9, briefly treating "Powers of the Faculty, Collective and Individual," offering new decisions which may be prophetic of oncoming changes in those fields. Three years ago faculty unionism and collective negotiations were only subtopics in Chapter 10, "Freedom of Association; Faculty Organizations." Now those issues seem to be in considerable part settled, but there is a flood of new decisions involving collective bargaining so that the few selected for inclusion here make Section 10 the largest section of all.

Other areas that have grown disproportionately are Section 5, "Tenure; Compensation: Promotion" and Section 3, "Due Process in Non-renewal of Probationary Contracts," both caused by temporary undue obsession with panicky financial retrenchment. Section 7, on "Discrimination: Sex, Race, National Origin, Age," has expanded, as has also Section 6, on "Discharge for Cause; Retirement."

Again my appreciation goes to my many advanced graduate students at three state universities; and for conspicuous fidelity and ability as secretary and editorial assistant I name Gwen B. Pruyne of Illinois State University.

Illinois State University
September 1976

M. M. Chambers

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1. INCEPTION OF THE CONTRACT 1

One of the essential requisites of a contract is a "meeting of the minds." In other words, "there can be no contract unless the wills of the parties thereto coincide." An assistant professor of history at Southern University, a state university at Baton Rouge, Louisiana, who had taught there for six years (on successive one-year contracts), orally informed his department chairman that he intended to spend the next academic year pursuing the degree of Ph.D. in history at some graduate school; and on March 19 wrote the chairman a letter saying he did not plan to work at Southern University during that year.

The evidence indicated that by May he had applied to two state university graduate schools and been rejected by both. Shortly thereafter he received a letter from the university informing him that his appointment for the next academic year had been recommended to the State Board of Education (at that time the governing board of the university), and requesting that he sign and return a copy of it to indicate that his services would be available. Although he ignored this letter, in early August he received a written contract for the next academic year, signed by the president, which he signed and returned within a few days.

On September 10 he sent a telegram to the president, asking if the university intended to honor his contract; and received a reply indicating that the sending of the letter and contract to him had been a clerical error, unintended. A Louisiana Court of Appeal concluded that in view of the facts, he knew or must have known that the sending of the contract to him did not represent the true intent of the university; therefore his own consent was flawed, and there was no contract; and dismissal of the case was affirmed (1).

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1 *Tobin* v. *Louisiana State Board of Education and Southern University*, (La. App.), 319 So. 2d 823 (1975).

2 FACULTY AND STAFF BEFORE THE BENCH

A teacher of East Asian languages at Indiana University at Bloomington worked there two years as a teaching associate and seven years as a lecturer. Having by that time earned his degree of Ph.D., he was then appointed an assistant professor for a term of three years; but soon thereafter was notified that his services would be terminated at the end of the academic year 1973-74 because of the University's inability to finance his position. Seeking damages, he alleged that he had been orally assured repeatedly that after earning his Ph.D. he would have lifetime employment. On the strength of these assurances, he said, he had at various times rejected offers of appointment from five other institutions; and asserted that he had a valid oral contract for lifetime tenure.

The University pleaded that under the historic Statute of Frauds (a feature of the laws of every state) an oral contract, if not capable of being fully executed within one year from the date of its making, is not enforceable. The trial court dismissed the case, but the Court of Appeals reversed the part of the judgment based on the Statute of Frauds, pointing out that a lifetime contract *is* capable of execution within one year, since the death of the party may occur at any time; but affirmed the dismissal of the case for lack of a claim on which relief could be granted (2).

The record is strangely bare of any mention that no professor has a contract until it has been voted by the university governing board; and that no officer of the university is authorized to offer a contract for lifetime employment, oral or written, unless conditioned on a vote of the board. It seems unfortunate that the record of this case simply ignores that universal principle. (Two decisions supporting it are discussed at pages 1-5 in *The Colleges and the Courts: Faculty and Staff Before the Bench.*)

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2 *Kiyose* v. *Trustees of Indiana University*, (Ind. App.), 333 N. E. 2d 886 (1975).

2. DUE PROCESS IN NONRENEWAL OF NON-TENURE CONTRACTS

This section is concerned with the simple situations in which a faculty member serves under a contract for a specified term (usually one year, sometimes less, sometimes more), which stipulates its own date of expiration, and says nothing about any renewal after termination. Persons thus employed are often called "non-tenured," "temporary," or "term" employees.

Probationary faculty members also serve under one or a series of short-term contracts, but they are said to be "in the tenure track," in a sense, because the tenure laws or rules provide that after a specified period of probationary service which is appraised as satisfactory or better they will normally become eligible for a tenure contract of indeterminate duration (3). Sections 3 and 4 are concerned with probationary faculty members' contracts.

Until about 1965 temporary or term teachers ordinarily had no claims at all after the expiration of their contracts--no right to reasons, a hearing, or other due process. After the First, Fifth, and Fourteenth Amendments and the Civil Rights Acts enacted thereunder began to be applied by federal courts to faculty members and students, however, the task of the courts which currently continues in full force is the task of *balancing* the constitutional rights of the teacher against the "compelling interest" of the state in operating excellent educational institutions.

A few recent cases illustrate this difficult duty.

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3 The classes of appointments are discussed at greater length and with precision at pages 11-12 of *The Colleges and the Courts: Faculty and Staff Before the Bench.*

4 - FACULTY AND STAFF BEFORE THE BENCH

First observe the instance of the female assistant professor of English whose contract was not renewed after its expiration in the Spring of 1970, and who alleged that this was in reprisal for her discussing the Vietnam War in her class on a day in October 1969; whereas the policy of the University was to minimize such discussions; and that this reprisal was in contravention of lawful exercise of First Amendment freedom of speech by her students and herself. On the contrary, several principal administrative officers of the University testified that she was not reappointed solely because her teaching methods had been adjudged inadequate by the faculty committee which regularly appraised the services of the faculty members.

U. S. District Judge Mac Swinford denied the University's motion to dismiss the case, and held a trial, in which he determined that the state's interest outweighed the teacher's asserted constitutional rights (on the basis of the evidence before him) and decided against her claim October 7, 1972. In the Sixth Circuit U. S. Court of Appeals, a three-judge panel unanimously affirmed this decision, June 15, 1973 (4).

Two cases at the University of Missouri, Kansas City campus. The separate complaints of a male and a female non-tenured assistant professor were both rejected by the U. S. District Court. Both were appealed to the Eighth Circuit U. S. Court of Appeals, where the judgments were affirmed. In each the attempts to prove contravention of Constitutional rights failed. In the first case the aggrieved professor, after having been supported by the University for three years in a

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4 As reported in the *Lexington Herald-Leader*, June 17, 1973, page 72; and in the *Richmond Daily Register*, June 18, 1973, page 1. Early phase discussed at pages 131-132 in *The Colleges and the Courts: Faculty and Staff Before the Bench.*

research project on criticism of English literature, in which it was understood he would publish a book, had produced neither a book manuscript nor an article nor any published item of any kind, and consequently was appraised by the regularly constituted faculty committee and the appropriate administrators as not sufficiently productive to be retained on the University faculty. Neither University rules nor Missouri law provided for any prior formal notice and hearing in such cases, but University rules allowed the option of giving him a *terminal* contract for one more academic year, which was done. The federal courts decided no constitutional right of due process had been violated. The real or major reason for his termination was his apparent low productivity--a matter to be decided by the University and not by the courts (5).

The second case was that of a woman assistant professor who had such serious personality clashes with one of her colleagues on the faculty, and likewise with one male student in her classes, that she complained to certain colleagues in the English department, including the department head, asking protection from violent confrontations with these persons. On one occasion she communicated with the dean of liberal arts, and telephoned the chancellor; but no action was taken in the matter, and at an appropriate time she was offered a terminal one-year contract for the following year, which she declined. This was in conformity with the same University rules mentioned in the preceding case.

In court she alleged that the real reason for her termination was reprisal for her lawful exercise of First Amendment free speech in making the complaints just recounted. The courts doubted that these in-house

5 *Watts* v. *Board of Curators of the University of Missouri*, (U.S.C.A., Mo.), 495 F. 2d 384; affirming 363 F. Supp. 883.

communications could be said to rise to the level of constitutional issues; and it appears that the University's reason for terminating her service was that her temperament did not fit her well for the normal stresses of faculty service--again a matter within the discretion of the University and not of the courts (6).

In each of the foregoing cases the balance between the "compelling interest of the state" and the alleged constitutional wrongs to the aggrieved parties seemed clearly to swing in favor of the former.

3. DUE PROCESS IN NONRENEWAL OF PROBATIONARY CONTRACTS

The years 1974 and 1975 saw the publication of judgments of United States Courts of Appeals in at least five Circuits--the Sixth, Ninth, Fifth, Eighth, and Third--in all of which reference was made to the epochal *Roth* and *Sindermann* decisions of the U. S. Supreme Court (1972), which are discussed at some length in Chapter 4 (pp. 53-57) in *The Colleges and the Courts: Faculty and Staff Before the Bench.*

One of the five Court of Appeals judgments reversed a U. S. District Court decision favorable to the nonretained professor; three affirmed decisions unfavorable to the professor; and one reversed a favorable decision and remanded for further proceedings.

At Memphis State University a probationary professor's contract was not renewed at the end of his fifth year. The reason, written by the chairman of his department to the Vice President for Academic Affairs, was "I believe his professional relationships with individual students frequently fail to meet

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6 *Frazier* v. *Board of Curators of the University of Missouri,* (U.S.C.A., Mo.), 495 F 2d 1149 (1974).

minimum standards." Apparently a hearing (post facto) had been conducted by a committee of tenured professors on September 22, 1972, and another by the University Committee on Academic Freedom and Responsibility on February 2, 1973, both concluding the University's procedure in the case had been proper. Chief District Judge Bailey Brown, stressing that nonrenewal of the contract on the charge of "failure to meet minimum standards" imposed on the professor a stigma that foreclosed his liberty to obtain other employment opportunities, ordered him reinstated pending a due process hearing.

Chief Circuit Judge Phillips (Sixth Circuit) and two colleagues disagreed that this result must follow from the *Roth* decision (in which no reason for nonrenewal was communicated, whereas in this case the derogatory reason was stated, but not for public circulation); and reversed, with direction to dismiss the complaint (7).

At California State College at San Bernardino, a probationary assistant professor was non-renewed at the end of his first year. In February a short letter from the president informed him, expressed regret, and stated no reason. In accord with the College's rules, the president obtained evaluations and recommendations from the Division of Social Sciences Committee on Retention, Promotion, and Tenure; from the college-wide committee of the same name; and from the Vice President for Academic Affairs.

Such matters were also within the purview of an elaborate code of "grievance procedures" adopted by the Trustees of the state college system (governing

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7 *Blair* v. *Board of Regents of the State University and Community College System of Tennessee*, (U.S.C.A., Tenn.), 496 F. 2d 322 (1974).

nineteen institutions). The nonretained professor availed himself of this, and a hearing thus provided resulted in an impasse in which he was repeatedly asked to outline what evidence had been ignored by the committees and the vice president, and he persistently replied that he could not do that without knowing what evidence had been considered. (He was not allowed access to the communications nor to his own personnel file.) At this stand-off he withdrew and went to court, complaining of that very fact and alleging that the existing statutes and rules denied him due process (Fifth Amendment) for that reason.

U. S. District Judge Jesse W. Curtis thought the professor's withdrawal from the administrative hearing precluded him from coming into court, and dismissed the complaint without leave to amend. This was affirmed by the Ninth Circuit (Circuit Judge Trask and two colleagues) (8). Neither court questioned the inviolability of the pertinent statutes, grievance procedures, or college rules, nor the practice of denying access to the pertinent communications, records, and personnel files.

A nontenured teacher in the Eastern Iowa Community College was notified in mid-March by the Board of Directors that it intended to consider termination of his contract at the end of the academic year because of several alleged deficiencies in his teaching services. He requested a private hearing before the Board to contest the matter. Such a hearing was held, and the Board terminated his contract. He then requested a public hearing as provided in an Iowa statute. The Board conducted such a hearing, at which he was present with legal counsel, and had opportunity to face hostile witnesses and cross-examine them (with the exception that such witnesses as were present were there voluntarily, because

8 *Burdeau* v. *Trustees of the California State Colleges*, (U.S.C.A., Cal.), 507 F. 2d 770 (1974).

the Board had no subpoena power to compel attendance). The decision to terminate his contract was reaffirmed.

U. S. District Judge William C. Stuart gave summary judgment for the Community College district, and this was affirmed in the Eighth Circuit U. S. Court of Appeals by Circuit Judge Donald P. Lay and two colleagues. The opinion construed the *Roth* decision of 1972 as not requiring procedural due process on this state of facts; and the teacher had been accorded due process under Iowa law. Quoting one of the Eighth Circuit's 1973 decisions in a school case, Judge Lay wrote: "Such matters as the competence of teachers and the standards of its measurement are not, without more, matters of constitutional dimensions. They are peculiarly appropriate to state and local administration" (9).

At the Indiana University of Pennsylvania an associate professor in the department of foreign languages was non-renewed at the end of her second year of service. She alleged that this was in violation of her right to an pre-termination hearing, was in retaliation for her exercise of protected speech, and penalized her for her religious beliefs. (She was Jewish.) U. S. District Judge William W. Knox decided that under Pennsylvania contract law and university rules and in accord with the *Roth* decision of 1972 she was not entitled to a pre-termination hearing, and that the other two parts of her complaint were unproved. (382 F. Supp. 1328).

Circuit Judge Van Dusen and two colleagues in the Third Circuit U. S. Court of Appeals affirmed the judgment, finding that her statements which she classified as protected speech were made only in private meetings

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9 *Brouillette* v. *Board of Directors of Merged Area IX, alias Eastern Iowa Community College*, (U.S.C.A., Ia.), 519 F. 2d 126 (1975).

of the department and committee, not publicized, and involved only a local in-house imbroglio over the handling of the preliminaries to the appointment of a new department chairman. They were thus distinguishable, the judges thought, from the public communications which are protected by the First Amendment, and are best left for local administrative disposition. In other words, there is a point below which local in-house conflicts do not rise to the level of national constitutional issues (10).

At Texas Woman's University a new assistant professor of modern dance was employed, possibly in the expectation that she might in the course of time succeed the elderly dean of the college of Health, Physical Education, and Recreation who had long held the post and developed the college to a recognized high level of excellence. The new teacher took no pains to conceal her belief that the dance curriculum and methods were out of date and unsuitable, and conflicts of opinion grew between the teacher and the dean during her first year of service, culminating in a request for her resignation in July by the vice president for academic affairs, who said he held written statements from several faculty members attesting to unprofessional conduct on her part. She refused to resign, and hired a lawyer; whereupon the president offered her in writing a terminal one-year contract for the next academic year. She accepted, but reserved all her rights, pointing out that the university faculty handbook called for a hearing by an *ad hoc* committee appointed by the president before a decision regarding termination would be made. Later the president offered to set up such a hearing, but her attorney rejected this and instituted a suit in U. S. District Court.

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10 *Roseman v. Indiana University of Pennsylvania*, (U.S.C.A.), 530 F. 2d 1364 (1975).

A year and a half elapsed before the court held a pre-trial hearing. After another ten months the court entered an order generally favorable to the assistant professor, including explicit directions as to how a university committee was to be composed (unlike the prescription in the university rules). The university appealed, and Circuit Judge Gee, sitting with Circuit Judges Rives and Godbold, wrote the opinion of the Fifth Circuit U. S. Court of Appeals reversing and remanding the judgment to obtain answers to crucial questions: Was the assistant professor discharged for exercising her First Amendment right of free speech? Was she subjected to "stigmatizing" charges? If so, were these accusations made *publicly* so as to jeopardize her career?

Discoursing on this difficult matter, District Judge Gee wrote: "It may well be doubted whether a subordinate's insistence on imposing his general policy views on his superior, controlling his own teaching assignments, or publicly denigrating his college fall within these protections, but it is certain that refusing to permit him to voice and apply in his teaching academic views relevant to assignments actually given him does."

In accord with its interpretation of the *Roth* and *Sindermann* decisions, the court indicated that if the three questions were answered affirmatively, then the District Court should remand the matter to the university for an administrative hearing on the merits, and for recommendation as to which was the weightier side of the balance between the assistant professor's constitutional freedom of speech and her usefulness as a faculty member in the circumstances. Finally the U. S. Court of Appeals declared that if any further legal proceedings should result from the administrative determination, they "will be conducted in accordance

with the principles laid down in *Ferguson*" (11). (The reference is to *Ferguson* v. *Thomas*, 430 F. 2d 852, U.S.C.A., Tex., 1970, discussed at pages 12-14, 56, and 132 in *The Colleges and the Courts: Faculty and Staff Before the Bench* (1973). In that case the Fifth Circuit U. S. Court of Appeals enumerated the minimum essentials of due process in such a case: (1) a written advance statement of reasons for non-renewal, (2) notice of the names and testimony of adverse witnesses, (3) an opportunity to be heard, by (4) a hearing tribunal "that both possesses some academic expertise and has an apparent impartiality toward the charges.")

4. SEQUELS TO *ROTH* AND *SINDERMANN*

This short section is in a sense a summary of the upshot of Sections 2 and 3 herein, which are concerned with non-renewal of non-tenured and probationary faculty members upon the expiration of their short-term contracts. In nearly every federal case decided since mid-1972 the courts have made reference to the *Roth* and *Sindermann* decisions of the U. S. Supreme Court on June 29 of that year (discussed in Chapter 4 of *Faculty and Staff Before the Bench*). It will appear that those decisions have had a retarding effect on the movement toward notice and hearing for non-renewed faculty members of the *Roth Case*-type; and that in a few instances the words of the *Roth* decision have been less than accurately interpreted.

Equally clear is it that if the aggrieved teacher can credibly allege that a main reason for his non-renewal was in retaliation for his lawfully exercised

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11 *Kaprelian* v. *Texas Woman's University*, (U.S.C.A., Tex.), 509 F. 2d 133 (1975).

freedom of constitutionally protected free speech, he will be heard in a federal court, and given opportunity to prove that allegation, difficult though it may be to do so.

Not to be overlooked is the fact that Professor Roth eventually revived his plea of free speech in the U. S. District Court in Wisconsin, and won some $7,000 in damages against the University at Oshkosh and three of its administrators who were adjudged to have wronged him.

Equally significant was the settlement of the *Sindermann* case out of court. When faced with the prospect of a trial of the facts before a U. S. District Court in Texas, the Odessa Community College paid Professor Sindermann $48,000 for back pay and attorneys' fees, and offered him reinstatement, which he declined.

The decisions of mid-72 and more recent years are not without effect in advancing the civil rights of faculty members in appropriate cases, though progress seems to come rather slowly.

5. TENURE; COMPENSATION; PROMOTION

One of the most widely publicized decisions of the middle 1970's on the rights of tenured college teachers involved Bloomfield College, a small commuter-type private college in New Jersey. The faculty handbook provided that after a probationary period of seven years, "a faculty member will have tenure and his services may be terminated only for adequate cause, except in case of retirement for age, or under extraordinary circumstances because of financial exigency of the institution." Another para-

graph declared: "Termination of continuous appointment because of financial exigency must be demonstrably *bona fide*. A situation which makes drastic retrenchment of this sort necessary precludes expansion of the staff at other points at the same time, except in extraordinary circumstances."

Pursuant to action by the board of directors June 21, 1973, the president on June 29 notified in writing thirteen members of the faculty that their services were terminated as of June 30, "due to financial exigency." On the same date all other members of the faculty, *tenured and non-tenured,* were notified that *all 1973-74 contracts would be one-year terminal contracts*. This was a sweeping abolition of faculty tenure. Between June and September 1973 the college engaged the services of twelve new and untenured teachers. It asserted that these were to replace those who had been lost through "normal attrition"; not those who had been terminated as sketched above.

Judge Antell of the local superior court saw the issues clearly and in a long and scholarly opinion concluded that the 13 faculty members terminated were entitled to reinstatement under the college rules, and all faculty members on tenure prior to June 1973 "are now, and shall continue, on tenured status within the terms of the same college rules"; and the actions taken June 21, 1973, "and all administrative actions taken thereunder, are in all respects inefficacious" (12). The conclusion was affirmed by the intermediate Appellate Court.

The facts disclosed that this small private college was owner of a large and valuable tract of golf

12 *American Association of University Professors, Bloomfield College Chapter* v. *Bloomfield College,* 129 N. J. Super. 276, 322 A. 2d 846 (1974). Affirmed in (App. Div.), 346 A. 2d 615 (1975).

course--country club type of real estate, perhaps originally acquired as a prospective site for a new campus, but in more recent years tenaciously held in the hope that it could eventually be developed as an upper-class residential colony from which the college would eventually reap large profit. Such eventualities require years, and may have been delayed by the panicky financial conditions of the early 1970's; but the business-oriented trustees apparently determined to adhere to the hope, even if it meant severe financial stringency for the college program and employees, and the abolition of tenure as above sketched.

It has been reported that the college has later sold the property in question for a sum large enough to ameliorate its financial ills for some time, and enable it to execute the order of the court to restore their contract rights to its tenured faculty members.

At this point it is essential to emphasize that this case concerned a *private* college. It is coincidental that at about the same time and in the same state, the New Jersey Board of Higher Education issued "guidelines" for faculty tenure in the public institutions of education above the high school. This gave rise to the litigation described briefly in the next subsection herein.

"Guidelines" on tenure issued by New Jersey State Board of Higher Education. The State Department of Higher Education is one of the major units of the Executive Branch in New Jersey, created in a reorganization of 1966. Its very name suggests that public higher education has been "ingested" into state government; but practical considerations make it more nearly correct to say the Department, headed by its Board of Higher Education and Chancellor, is not a statewide *governing* body, but rather a relatively strong *supervisory* agent over the eight State Colleges

and with similar jurisdiction over the County Colleges (public community colleges), and a lesser degree of dominance over the 210-year-old "Rutgers, The State University of New Jersey" and the other high-level state institutions of higher learning.

As to the State Colleges, the legislative act provided for each a separate board of trustees with substantial governing powers; but also conferred on the Board of Higher Education substantial supervisory powers. The possibility of ambivalent interpretations is present, and led to a lawsuit when the Association of New Jersey County Faculties, Inc., objected to "guidelines" for faculty tenure issued by the Board and Chancellor. The suit was unsuccessful. The unanimous state supreme court held that the issuing of the "guidelines" was not procedurally impermissible and did not overstep the statutory authority of the Board nor contravene any existing labor relations laws (13).

It appeared that the guidelines were not in the vein of mandatory executive orders directing the colleges curtly to adopt and implement specified practices with absolute mathematical precision, with no elbow-room for exercise of discretion in particular circumstances. They did not prescribe any rigid unalterable "quotas" of tenured and nontenured teachers in any institution, but managed skillfully to convey, by scholarly reference to recognized facts and good reasoning, that loose administration of tenure rules, if practiced over some years, could lead to intolerable destruction of necessary flexibility in college administration, to the detriment of the institutions; and simply urged continuous advance planning by the colleges in that respect as well as others.

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13 *Association of New Jersey State College Faculties, Inc.* v. *Dungan*, 64 N. J. 338, 216 A. 2d 425 (1974).

In a sense the method of communication resembles the tactics currently widely used by the federal government to obtain compliance with various civil rights, equal employment opportunity, and anti-discrimination legislation and regulation; not to establish criminal penalties (or any penalties other than cessation of federal contracting); not to issue flat-out imperious commands couched in inflexible language; but rather to procure progress toward full compliance gradually by means of reasoning and persuasion rather than mandate.

The associations of Jersey faculties contended that the guidelines were improper and unlawful because they dealt with matters compulsorily negotiable in collective bargaining contracts under current state labor relations laws; but the unanimous court held that instead these matters were presently within the legal responsibility and prerogative of the Board, and that no existing statute or contract made them mandatorily negotiable.

At the same time the court was careful to note with approval that the guidelines had not been adopted and disseminated until after opportunities had been provided for local boards of trustees, college presidents, and faculty members to communicate comments and criticisms to be taken into consideration in the drafting of the final version; and strongly intimated that the action might have been arbitrary without these opportunities for prior consultation.

Part-time teachers are not excluded from tenure in a junior college in California. At Gavilan College at Gilroy in Santa Clara County, California, Edward Ferner was employed as a full-time teacher for three years and then an additional year part-time; and by virtue of his reappointment for the fourth year became a tenured teacher. During his third year the board of trustees had informed him that his services would not be needed for the next academic year because the por-

tion of the aeronautical program to which he was assigned was being discontinued. He was given an administrative hearing in accord with *Education Code* sections 13443 and 13447. The hearing officer found it was not true that all the services performed by the teacher were being discontinued, and concluded that he was entitled to reappointment on the basis of 13/45 time. The college complied with this finding.

During the following summer one of the two other faculty members assigned to the aeronautical department resigned, leaving a full-time position vacant; and Ferner applied for it, claiming a right of preference over other applicants by virtue of Section 13448, which provides for such preference for tenured faculty members. In the California Court of Appeal the college argued that Ferner was not a tenured employee, because his reappointment for a fourth year as only a part-time teacher could not give tenure; or, in the alternative, Ferner could have acquired tenure only for *part-time* employment. Judge Vincent Brunn of the Superior Court rejected both these contentions and issued a writ of mandate ordering the college to classify Ferner as a tenured employee and reappoint him to the vacant full-time position. This was affirmed in the three-judge Court of Appeal (14).

This was a matter of statutory interpretation under the California tenure law applicable to certificated employees in public schools through the fourteenth grade. It makes tenure automatic upon reappointment after three years of service. In many other states, such as Michigan, for example, there is no statewide tenure law applying to community colleges; and their policies and practices in that respect tend

14 *Ferner* v. *Harris*, (Cal. App.), 119 Cal. Rptr. 385 (1975).

to be similar to those of other institutions of higher education, where tenure is generally not automatic (15).

An earlier California case somewhat similar to that of *Ferner* was *Vittal* v. *Long Beach City College*, discussed in *Faculty and Staff Before the Bench* at page 76 (16).

Procedural impeccability is prerequisite to discharge of a tenured teacher. A tenured professor at the University of Alabama at Tuscaloosa contested his attempted discharge in the U. S. District Court, where Chief District Judge Frank H. McFadden ordered the University to rehear his case, and to continue to pay his salary during the process of remand and rehearing, because the initial hearing was deemed to have been marred by procedural deficiencies. The professor immediately appealed from this order to the Fifth Circuit U. S. Court of Appeals, seeking to place the merits of his case before that tribunal. Circuit Judges Bell, Thornberry, and Gee declined the appeal and affirmed the District Court's orders, preferring not to consider the merits until they might be presented after the second University hearing. As of April 14, 1975 a record of the facts and the law awaited further proceedings (17).

Other cases concerning due process in Discharge for Cause are recited in Section 6 herein, which bears that caption.

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15 *Shaw* v. *Board of Trustees of Macomb Community College*, 37 Mich. App. 96, 194 N. W. 2d 558 (1971), discussed at pages 78-79 in *op. cit.*

16 *Vittal* v. *Long Beach United School District*, 8 Cal. App. 3d 112, 87 Cal. Rptr. 319 (1970).

17 *Bowling* v. *Mathews*, (U.S.C.A., Ala.), 511 F. 2d 112 (1975).

Salaries or stipends for work for benefit of the employer are taxable as income under the federal Internal Revenue Code; scholarships not. A married woman Ph.D. in physiological chemistry was employed in 1966 by the Ohio State University Research Foundation as a research assistant to do research in vision. Her pay was somewhat over $10,000 a year, plus all the fringe benefits received by regular employees. She was expected to work full-time, and produce results of her research and make them available to the scientific public.

She and her husband made joint income tax returns for the years 1967 through 1969; and deducted $300 per month from her income from salary, on the ground that that amount represented a postdoctoral fellowship not subject to income tax.

The U. S. Tax Court disallowed the deduction, holding that her entire pay was taxable; and this judgment was curtly affirmed by the Sixth Circuit U. S. Court of Appeals (18), citing the 1969 decision of the U. S. Supreme Court in which it was held that Western Electric Corporation stipendiary grants to selected employees to enable them to "research, write, and defend their Ph.D. theses in nuclear engineering" were fully taxable as ordinary income (19).

The general principle which seems to be followed by the Internal Revenue Service and by the courts is

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18 *Gibb* v. *Commissioner of Internal Revenue*, (U.S. C.A., Ohio), 501 F. 2d 1086 (1974).

19 *Bingler* v. *Johnson*, 394 U. S. 741, 89 S.Ct. 1439, 22 L.Ed. 2d 695 (1969); reversing 396 F. 2d 258 (1968). Discussed at pages 78-80 in *The Colleges and the Courts: The Developing Law of the Student and the College.*

that a gift or grant to a student to enable him to study, and for which he is not required to perform any other service, is properly called a fellowship or scholarship and is exempt from federal income tax; but that income from an assistantship or traineeship which is in fact pay for work performed for the benefit of the employer is taxable as ordinary income.

Promotion involves an exercise of administrative discretion. The U. S. Merchant Marine Academy at King's Point, New York, is an agency of the Maritime Administration within the Department of Commerce. Appointment and promotion of civilian faculty members is therefore governed by civil service rules which provide for multiple "slots" of rank and pay within each of the customary academic ranks. In accord with an agreement reached between the Maritime Administrator and the United Federation of College Teachers, faculty salaries at the Academy were revised so as to correspond more closely to those of the U. S. Naval Academy at Annapolis, Maryland. The administrative order specified that "those faculty members fully meeting the Maritime Administration qualifications for their rank *may* be converted to a higher rate in the upper pay category for their rank when the upper pay category is determined to be merited based on such factors as demonstrated professional competence and achievement, teaching ability, scholarly activity, and potential for future development."

Two associate professors who had recently been promoted to full professor contested in the U. S. Court of Claims their "slotting" in the lower category for that rank, but were unable to prove that the determinations of their administrative superiors were other than proper exercises of discretion. "Without a certain freedom of decision, without the power of choice, there can be no true discretion." In other words, academic promotion is not automatic, but

involves subjective judgments at least in part; and the burden of proving alleged abuses of discretion is on him who complains (20). This is true generally of universities and colleges everywhere, not merely of the few operated by the U. S. government.

6. DISCHARGE FOR CAUSE, WITH DUE PROCESS; RETIREMENT

The most elementary principle that a tenured professor can not lawfully be discharged without due process is spotlighted in a 1974 decision of the U. S. District Court in Idaho which could appropriately be called a "textbook" case. It involved Idaho State University at Pocatello. At a meeting in April 1973 the State Board of Education (governing board of the state institutions of higher education in Idaho), after having made decisions regarding faculty salaries and proposed reappointments at the several institutions, took the very unusual tack of directing the president of Idaho State University to make a special in-depth "evaluation" of a tenured professor of biology who was both a medical doctor and a Ph.D. in zoology, and who had served at Idaho State twenty-five years. No hint appears in the record concerning the origin of this unprecedented action.

The president asked his faculty affairs advisory committee to perform the task; and when called together by its chairman the committee voted "less than unanimously," we are told, to accept the task. Learning that letters requesting information about him were to be circulated to various persons by the committee, the professor under investigation asked the chairman, both by telephone and by letter, to include a warning to

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20 *Drucker and Pearson* v. *United States*, (U. S. Ct. Claims), 498 F. 2d 1350 (1974).

all respondents that their statements might be subjected to the tests of credibility and legality in a court of law. Some members of the committee thought any such warning would prevent any objective evaluation, while some other persons thought the same warning would be a necessary prerequisite to an objective evaluation, by diminishing the probable influence of hearsay and irresponsible rumors. The majority of the committee believed the letter would not prevent them from making a valid evaluation.

The professor made his letter public on the campus, and the president and the chairman of the State Board of Education became very agitated. The chairman told the president that the board would take the matter out of the hands of the administration and faculty, and make it a subject of direct action by the board. There were two lawyers on the board, and consultation was had with the assistant attorney general assigned to the board. All thought the board had power to discharge any professor summarily by state statute. Apparently all thought, too, that the professor's letter and telephone conversation "thwarted an order of the board" and were good cause for dismissal.

By telephone vote the board unanimously voted to discharge the professor, for cause, immediately; and he was so notified on April 23. Three weeks later he appeared, with counsel, at a regular meeting of the board. His lawyer informed the board that no tenured professor could be discharged without notice and hearing to determine the existence of good cause. Thereupon the chairman offered to entertain a motion to reconsider the discharge order, but no motion was offered; and the meeting adjourned.

With the assistance of American Civil Liberties Union attorneys, the professor's case was presented

before U. S. Chief District Judge McNichols, who concluded (speaking of the board's discharge order): "This action deprived plaintiff of a valuable property right without due process of law in violation of the safeguards provided by the United States Constitution . . . Defendants are to be directed to forthwith reinstate plaintiff in his employment . . . and to be restrained from any further acts designed to interfere with plaintiff's right to employment by any means except those in which due process is provided. . . He is entitled to be reimbursed for the salary and other monetary benefits he should have received had he not been wrongfully discharged" (21).

In the course of his opinion Chief Judge McNichols took pains to enumerate the minimum essentials of the "due process of law" which must be afforded to any tenured teacher before he is discharged. (The same procedure is due to any non-tenured or probationary teacher who is discharged *before* the expiration of his contract; *not* merely *non-renewed after* that date.) (22)

"(1) Specification of charges of conduct or performance alleged to warrant deprivation of continued employment,

"(2) an opportunity to respond to those charges, and

"(3) a fair and impartial fact-finding process to determine the validity or non-validity of the charges."

On this seemingly paramount and central point of precisely what are the minimum requisites of due process, it is necessary to understand that no court has

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21 *Lyman* v. *Swartley, President of Idaho State Board of Education,* (U.S.D.C., Idaho), 385 F. Supp. 661 (1974).

22 Note that only terminations by *expiration and non-renewal* are discussed in Sections 2, 3, and 4 herein.

ever consented to construct a mathematically precise listing of essentials that would constitute a rigid universal rule for all parties in all circumstances. Instead, all courts have maintained that the various requisites in different circumstances are to be determined on a case-by-case basis to fit each particular set of facts, with the ultimate aim of *fairness*.

Listings of some of the essentials in different cases are found in *Faculty and Staff Before the Bench* at pages 13-14, 21-23, 30-32, and 130-132. Somewhat similar statements about due process for accused *students* in disciplinary cases appear in *The Developing Law of the Student and the College* at pages 219-220, 252, and (with accompanying descriptive and explanatory text) 213-246.

The first round of litigation in a controversy between the University of Arizona and its tenured professor of surgery who was also its head of the department of surgery took place in U. S. District Court. The University had terminated his service as department head without prior hearing in October 1973, and suspended him from his professorship in February 1974. He sued for money damages and an order of reinstatement. U. S. District Judge Turrentine, in his decision published on May 3, 1974, ordered (1) that the University reinstate him as head of department "but may at its option relieve him from performing any duties as head pending a hearing in accordance with the rules in its *Faculty Manual*; and (2) the University continue effective its offer to the plaintiff "to hold a hearing regarding his status as professor" (which he had previously ignored); and added that "plaintiff shall have ten days from the date of this order to request a hearing, which shall be afforded him within ten days of receipt of such request. . ." (23).

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23 *Peacock* v. *Board of Regents of Universities and State Colleges of Arizona*, (U.S.D.C., Ariz.), 380 F. Supp. 1081 (1974).

From the recital of the facts in the opinion it appeared that the professor had for some time shown inordinate ambition to aggrandize the department of surgery even if at the expense of other departments; that he had alienated himself from his fellow heads of departments, and antagonized some of the members of his own department; after his termination as head and suspension as professor, he had orchestrated a movement inside and outside the campus to obtain his reinstatement; the department was in a state of turbulence, with its ability to perform its educational functions substantially impaired; and "the conflict had escalated to the point that it would be most difficult for plaintiff to reintegrate himself into the workings of the hospital."

Compulsory retirement at a predetermined age is held not to violate any constitutional right. Among the burst of decisions released during the last days of its 1975-76 term, the U. S. Supreme Court sustained the constitutionality of a Massachusetts statute requiring all state policemen to retire at age 50. There is a rational basis for such a law, said the court, because policemen must be fit for physically arduous duties and there is an undoubted relationship between advancing age and decreasing physical ability (24).

This judgment of the generally conservative high tribunal, though it applies to only one class of public employees, will very probably delay the current tendency toward devising some economically sounder and more humane provisions to supplant the widely prevalent rigid compulsory age of retirement for employees in both the public and private sectors. The court's pronouncements regarding "age discrimination" in this case are briefly discussed in Section 7, *infra* herein.

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24 *Massachusetts Board of Retirement* v. *Murgia*, (U.S.S.Ct., June 25, 1976).

The Ohio supreme court, in a case involving Case Western Reserve University and a professor of English who had served since 1929, decided, by a vote of 6 to 1, that the private university could lawfully reduce the compulsory age of retirement from 70 to 68, thus depriving the professor of two years of employment at his highest salary, which would have probably enabled him to add to his lifetime savings and also would have increased his retirement allowance. The decision is that the board of trustees of the university has plenary authority to manage all aspects of the institution, and to enact and amend from time to time bylaws and rules which automatically become a part of the contract of every employee, including tenured professors, in the absence of any special agreement to the contrary. The conferring of tenure "does not preclude the university from thereafter changing the retirement age for all faculty members, including the tenured faculty member, provided the change is reasonable and uniformly applicable" (25).

There was one vigorous dissenting opinion by Justice Celebrezze. He was impressed by the apparent hardship on the professor in this particular case: his average annual salary for the three years preceding compulsory retirement at age 68 was $12,700. His pension for 1975 would be $4,755. This was evidence, thought Justice Celebrezze, that the university's reduction of the retirement age near the upper limit of an elderly professor's long period of service was a grave injustice; and that in such a case the court should hold that the university could not lawfully make such a change without accompanying it with reasonable "transition provisions" to lessen the hardship upon professors adversely affected.

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25 *Rehor* v. *Case Western Reserve University*, 43 Ohio St. 2d 224, 331 N. E. 2d 416 (1975).

This view is in accord with the American Association of University Professors' 1950 *Statement of Principles on Academic Retirement and Insurance Plans:* "When a new retirement policy or annuity plan is initiated or an old one changed, reasonable transition provisions either by special financial arrangements or by the gradual inauguration of the new plan, should be made for those who would otherwise be adversely affected."

It is noteworthy that Justice Celebrezze agreed with what the majority of the court had said about conventional legal theory, but he could not stomach the injustice in this case. This calls to mind the ancient adage, "Good decisions make bad law," and its obverse, which one supposes would be, "Strict adherence to traditional legal theory sometimes makes bad decisions." (A related topic is in Section 7, "Age Discrimination.")

7. DISCRIMINATION: SEX, RACE, NATIONAL ORIGIN, AGE

There are as yet few definitive decisions of high-level courts regarding "affirmative action" to reduce or eliminate discrimination in employment, pay, promotion, and other college or university personnel actions. This is due to the well-grounded reluctance of courts to invade the professional field of educational administration and substitute their judgment for the discretion placed by statute in persons employed for that purpose and presumably competent in a profession in which judges disavow any expertise.

The acts of Congress, executive orders, and administrative regulations prohibiting discrimination seem in many instances to lend themselves to execution by methods of persuasion and negotiation as well as by mandatory court orders. There is also the historic

reluctance--now much modified--of federal courts to issue orders to states or state agencies. It seems probable that in time the topics indicated in this section will become the subject of many conclusive judicial decisions. (Racial discrimination in higher education already has a 40-year history in federal courts; but discrimination on account of sex, national origin, or age are for the most part relatively new in the field of litigation.)

In many examples at various institutions in diverse parts of the nation, female faculty members have obtained by out-of-court negotiation such *desiderata* as reinstatement, tenure, promotions, equal pay, and retroactive payments to compensate for proved past discrimination (26). Something of the difficulty of proving to the satisfaction of federal courts that they should intervene in such cases is partly illustrated by two federal cases in which pleas of sex discrimination were unsuccessful.

On March 14, 1974 the chancellor of the University of Wisconsin-Milwaukee notified a woman professor that her employment would be terminated ten days after that date unless she requested a hearing on the charges contained in the notice. In that event, she would be provided with the safeguards of procedural due process in a hearing before the appropriate University Committee, described thus:

"She will receive notice with specific charges in writing. She will receive names of witnesses against her and will have access to evidence. A valid claim

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26 Brief reports of a number of such instances are found, for example, in *On Campus with Women*, No. 3 (April 1974), a periodic publication of the Project on the Status and Education of Women, sponsored by the American Council on Education, Washington, D. C. 20036.

of surprise will entitle her to an adjournment of the hearing. She will have the right to take the stand or, on the other hand, to exercise her privilege against self-incrimination. The right to counsel, to present witnesses, and to cross-examine adverse witnesses will be guaranteed. The ultimate decision of the hearing body will be based on findings of fact and a stenographic record. The administration will carry the burden of proof and will be governed by *Wisconsin Statutes*, section 227.10. The hearing will be closed to the public unless she wants it open."

The chancellor would review the record and make his recommendation to the Board of Regents. If his recommendation were adverse to the accused, she would then have a right of appeal to the Board, and thence to court. These proceedings would require a minimum of several months. During their pendency her salary would continue. Disregarding this, she took her case immediately to Chief Judge Reynolds of the U. S. District Court, pleading that loss of her employment was imminent and was caused by sex discrimination; and asking a temporary injunction, or in the alternative, an order of immediate reinstatement. This was quickly denied on the ground that there could be no proof of any immediate or irreparable injury. Quoting from *Roth* and other decisions, Judge Reynolds wrote: "It has consistently been recognized that 'where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him (or her), notice and an opportunity to be heard are essential.'" Also: "Once a person has cleared his (or her) name at a hearing, his (or her) employer, of course, may remain free to deny him (or her) future employment for other reasons." But: "The employer, however, does not afterwards become free to remove an individual from employment on the grounds of race, color, religion, sex, or national origin. Title 42, section 2000c-2, *Civil Rights Act* of 1964, prohibits this."

Denial of the temporary restraining order was simply because it would be both premature and redundant in the circumstances, and indicated that the plaintiff professor must first exhaust the available administrative remedies. "She cannot at this stage of the proceedings allege that her reputation has been harmed and simply forego the administrative process available to challenge and refute the charges against her." A further order gave the plaintiff fifteen days in which to amend her complaint, and the defendants fifteen days thereafter to file an amended answer (27).

Another futile and apparently not well-founded suit was that of a Puerto Rican woman scientist employed by the Department of Rehabilitation Medicine at the private New York University. Holding a Ph.D. in Anatomy, she had been brought from Puerto Rico on a "soft money" temporary research grant which expired at a time when the University was in dire financial straits, yet nevertheless provided her with temporary employment for two or three semesters thereafter, but finally felt compelled to advise her that her employment must be terminated as of December 31, 1973. She sued in U. S. District Court, where District Judge Kevin Thomas Duffy denied her application for a temporary injunction; and this was affirmed by a unanimous three-judge panel of the Second Circuit U. S. Court of Appeals holding that she had utterly failed to provide proof of her allegation that the University discriminated against her because she was a woman (28).

The U. S. Circuit Judge who wrote the opinion used language verging upon ridicule: "She envisions

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27 *Jaroch* v. *Board of Regents, University of Wisconsin System*, (U.S.D.C., Wis.), 372 F. Supp. 106 (1974).

28 *Maria Diaz Faro* v. *New York University*, (U.S.C.A., N.Y.), 502 F. 2d 1229 (1974).

herself as a modern Jeanne d'Arc fighting for the rights of embattled womanhood on an academic battlefield, facing a solid phalanx of men and male faculty prejudice. . . She states that she was offered $4,000 for the same job for which a male doctor was paid $23,000. Of course, as the district court found and the record substantiates, it was not the same job." Other suits, perhaps better grounded, will in time reach the federal courts, possibly with different results.

There are legal complications. Some U. S. Courts of Appeals have held that institutional "affirmative action plans" drawn up under Executive Order 11246 (which purports to implement the Civil Rights Act of 1964), and giving preferential treatment to women in hiring practices, are compatible with the Act; but the U. S. District Court has recently held that preferential treatment for women, including goals and quotas, actually violates the Act's prohibition of sex discrimination, as well as the Fourteenth Amendment guarantee of equal protection of the law, in the case of Virginia Commonwealth University (29).

On the contrary, it was reported in the press of July 26, 1976, that Valentine R. Winsey, a woman associate professor at Pace University, a private institution in New York City, who alleged that she had been denied tenure and given a terminal contract unjustly because of discrimination against her sex, was awarded a judgment for $75,000 for back pay and an order of reinstatement by the New York Court of Appeals (the highest court in that state). This reversed the judgments of two lower state courts (30). She had also

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29 *Cramer* v. *Virginia Commonwealth University*, (U.S.D.C., Va.), June 28, 1976.

30 In the *Chronicle of Higher Education*, July 26, 1976.

been defeated in a separate action in federal court by a summary judgment for Pace University by the U. S. District Court, issued May 6, 1975 (31).

Cases on racial discrimination against faculty members in state universities and colleges are also in early stages; but federal decisions regarding teachers in lower schools have become explicit. Late in 1975 the U. S. District Court in Delaware (Judge Stapleton) held that the complaint of a black professor of sociology at the University of Delaware could properly be brought as a "class action," on behalf of the plaintiff and others similarly situated (32).

The liveliest federal cases since 1970 are those which forbid the use of scores on "The National Teachers' Examination" as a basis for discharges, demotions, or other unjustified hardships imposed on black teachers in local public elementary and secondary school districts. Such use of the standardized test is unjust and impermissible (especially when it is surreptitiously employed to discriminate against black teachers) because it "does not measure manual skills, teaching aptitude, personal characteristics, or classroom teaching performance" (33).

The Fifth Circuit U. S. Court of Appeals also holds that forms used for the periodic rating of teachers, composed mainly of questions to be subjec-

31 *Winsey* v. *Pace College*, (U.S.D.C.,N.Y.), 394 F. Supp. 1324 (May 6, 1975).

32 *Scott* v. *University of Delaware*, (U.S.D.C., Del.), 68 Federal Rules Decisions 606 (September 11, 1975).

33 *Baker* v. *Columbus Municipal Separate School District*, (U.S.C.A., Miss.) 462 F. 2d 1112 (1972), and later cases in accord.

tively answered by evaluators, "do not meet the test of nonracial objectivity" (34).

A federal case in New Mexico alleging discrimination because of national origin, demonstrates that confidential records of faculty personnel may be reached by subpoena. Proof of discrimination, on whatever ground, is almost always aided by access to the personnel records of comparable faculty members in the University's confidential files. The U. S. District Court ordered the University of New Mexico to produce such files for the Equal Employment Opportunity Commission for its examination of the complaint of a faculty member who alleged he was discriminated against on account of his national origin. This was affirmed by the Tenth Circuit U. S. Court of Appeals (35).

Discrimination on the ground of age is a somewhat novel concept. One way to open this subject is to quote the vigorous words of Howard Eglit, legal director of the Roger Baldwin Foundation of the American Civil Liberties Union: "Kicking people out of work solely because of their age is as invidious and objectionable as refusing to hire women because some of them become pregnant, or keeping black kids out of white folks' schools. Compulsory retirement is just another name for discrimination."

Here we return to the 1976 U. S. Supreme Court decision in *Massachusetts Board of Retirement* v. *Murgia*, one aspect of which has already been briefly discussed in Section 6, *supra* herein. The Justices said claims of age discrimination will be rejected

34 *United States* v. *Texas Education Agency*, (U.S. C.A.,Tex.), 459 F. 2d 600 (1972).

35 *Equal Employment Opportunity Commission* v. *University of New Mexico*, (U.S.D.C., N.M.), 7 EPD 9118 (1973). Affirmed in (U.S.C.A.,N.M.), 504 F. 2d 1296 (1974).

if there is *any rational basis* for the law or regulation in question. This is a different standard from that used in cases involving other types of discrimination, such as on the basis of race or national origin. There the complaint is balanced not against *any rational basis for the law*, but against the weightier standard of *a compelling interest of the state*. To a layman this may seem only semantics; but the difference is real.

The court went on to say: "While the treatment of the aged in this nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." It seems questionable whether this statement is wholly correct in practical life, or even in a narrow legal sense.

The Board of Regents of the University of Hawaii had an employment policy fixing compulsory retirement at age 65. A faculty member who was refused employment solely because he had passed 65 was granted an injunction against enforcement of the policy in his case, and this decision was affirmed by the state supreme court, saying: "Age discrimination for its own sake has no place in public employment in our society . . ." (36). A continuing trend in that direction is probably to be anticipated.

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36 *Nelson* v. *Miwa* , (Hawaii), 546 P. 2d 1005 (1976).

36 - FACULTY AND STAFF BEFORE THE BENCH

8. LAWFUL EXERCISE OF FREEDOM OF EXPRESSION

When non-renewal of a probationary teacher's contract appears to the court to have been indisputably in retaliation for lawful exercise of constitutionally-protected rights of expression, the teacher will be given an appropriate remedy; and the individuals in authority who were responsible for the wrong may be personally liable for punitive damages. This modern trend is illustrated by a case arising at Brookdale Community College in New Jersey and decided by Superior Court Judge Merritt Lane in 1975.

Patricia Endress, professor of journalism, would normally have been placed on permanent tenure June 30, 1975, having completed her probationary period. On June 27 the board of trustees voted to terminate her contract because of an editorial she had written and published in the college newspaper. The editorial commented critically on the fact that the trustees had awarded a contract for a $25,000 purchase of audio-visual equipment to a firm headed by the nephew of the chairman of the college board, and accused the chairman of a conflict of interest. In fact, the chairman himself had formerly been an officer and director in the same firm.

To Judge Lane it was clear, first, that Endress' rights under 42 *U. S. Code* section 1983 could be invoked, and that her proof of violation of First Amendment rights of free expression entitled her to redress for being dropped summarily without notice or hearing; and second, that her editorial was not libelous, as was claimed by the college, but only a fair and truthful statement about the acts of a public officer, with no evidence of malice or other improper motive. He awarded compensatory damages against the college, and punitive damages against the college president and six trustees individually: the college to pay $10,000

as general compensatory relief, $10,000 for attorneys' fees, and $14,121 as restoration of lost earnings; the president and six trustees individually to pay $10,000 each as punitive damages, making at total of $104,000 awarded to the aggrieved professor.

In the course of his scholarly and forward-looking two-hour opinion Judge Lane remarked: "Punitive damages are absolutely necessary to impress people in authority that an employee's constitutional rights cannot be infringed" (37). The judge also ordered the professor of journalism reinstated, *with tenure*. Evidence indicated that in the course of events she would have been offered a tenure contract within a week, if the sudden unlawful action of the board had not occurred.

Action by a private university is not state action. The protections in the Bill of Rights and the Fourteenth Amendment are in the main prohibitions directed to the states, or to all levels of government. The Civil Rights Acts of Congress enacted thereunder, including the widely used 42 *U. S. Code* section 1983, give aggrieved parties access to remedies against the states "or to persons acting under color of state law." As of this date (mid-1976) many earlier decisions have held that private nonprofit universities and colleges are not constrained by these safeguards because their actions are not "state action," even in instances where such an institution receives large parts of its income from tax sources.

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37 In the absence of a published court report, this recital is based on press stories in the *New York Times* for May 2, 1975 (by Walter H. Waggoner), and an unattributed news story in the *N.E.A. Advocate* for June 1975. Also noted in the *Chronicle of Higher Education*, May 12, 1975.

This condition of the law may be about to change. As early as 1971 a special three-judge court in the District of Columbia, in an opinion by Circuit Judge Harold Leventhal, declared that "the Federal Revenue Code requires the denial and elimination of Federal tax exemptions for racially discriminatory private schools and of Federal income tax deductions for contributions to such schools"; and this judgment was summarily affirmed by the U. S. Supreme Court (38). Private institutions are also within the purview of the more recent Civil Rights Acts which forbid discrimination on grounds of race or sex, on pain of cessation of federal financial aids.

A 1975 decision of the Fifth Circuit U. S. Court of Appeals illustrated, however, that a discharged professor suing Loyola University in New Orleans for alleged violation of his rights of free speech and due process could have no recourse in federal courts because Loyola University is a *private university* not capable of exercising "state action" (39). This conclusion was unaffected by the fact that Loyola University enjoys exemptions from both federal and state taxes, receives both federal and state moneys in the form of grants, subsidies, and loans, and owns and operates a radio and television station licensed and regulated under the Federal Communications Act. As to another aspect of this latter feature, an interesting and somewhat amusing challenge to the original licensing of the Loyola broadcasting station was dis-

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38 *Green* v. *Connally*, 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed. 2d 550 (1971). Summarily affirming (U.S.D.C., D.C.), 30 F. Supp. 1150 (1971).

39 *Blouin* v. *Loyola University*, (U.S.C.A.,La.), 506 F. 2d 20 (1975).

missed by the U. S. Court of Appeals for the District of Columbia in 1958 (40).

9. THE "LOYALTY OATH" FUROR seems presently not to be litigated; and is herein supplanted by:

9. FACULTY POWER, COLLECTIVE AND INDIVIDUAL

In 1971 the legislature of Washington enacted an "Open Public Meetings Act" (*Revised Code of Washington* section 42.30), specifying in part: "All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting. . ., except as otherwise provided in this chapter."

Certain students at the University of Washington School of Law sued to have the Act declared applicable to the faculty of the School of Law. The trial court dismissed the suit on the ground that, as is uniformly true in all states, the Board of Regents has exclusive plenary legal power to govern the state university, and that none of its power is exercised by any of its employees, singly or collectively, except by delegation from the Board, and then always subject to approval or veto by the Board. In this view no faculty or faculty group could be called the "governing board of a public institution," though it wields important power by delegation as described.

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40 *Noe* v. *Federal Communications Commission*, 104 App. D. C. 221, 220 F. 2d 739 (1958). Certiorari denied, 359 U. S. 934, 79 S.Ct. 607, 3 L.Ed. 2d 627 (1959). Discussed at pages 174-175 in *The Colleges and the Courts Since 1950*.

It is true in practice, however, that college, school, and departmental faculties usually meet regularly and make many in-house decisions that are later routinely ratified by the Board, or in many instances not even officially brought to the attention of the Board. In such instances it could be said that the faculty exercises a measure of power *tacitly*, though technically its function is never more than *advisory* to the Board, which has the prerogative of final decision.

After reviewing applicable state statutes and Regents' resolutions touching this matter in the state of Washington, and the positive language of other sections of the Open Meetings Act, the Washington Court of Appeals reversed the trial court and declared the Act applicable to the Law School Faculty; and this judgment was affirmed by the state supreme court, in an opinion by Justice Wright, concurred in by the unanimous court. The rationale is best expressed in the words of Justice Wright: "We believe that the purpose of the Act is to allow the public to view the decision-making process *at all stages*. The decisions of the faculty are 'conditional' only in an abstract hypothetical sense and the board of regents adopts faculty actions almost as a matter of course." He pointed out that "During the academic year 1970-71, the law school faculty, sitting as a multi-member, decision-making body, unilaterally approved curriculum additions and deletions, amended the scholastic standards required of its students, exercised its authority to provide adequate instruction and supervision of its students, and took final action related to the sponsorship of guest speakers and other extra-curricular uses of law school facilities."

The decision was supported by words in the Open Meetings Act which expressly made it apply to "sub-

agencies," and by phraseology in its enacting section which Justice Wright described as "some of the strongest language we have seen in any legislation." One sentence therein was "The people insist on remaining informed so that they may retain control over the instruments they have created."

All these factors convinced the court that by declaring that the act was applicable to the law school faculty, "the legislative intent and purpose is being complied with" (41).

In sharp contrast, the supreme court of Colorado has held that even the Board of Regents of the University of Colorado is not within the scope of the Colorado open meetings act ("Sunshine Law"), on the rationale that the Board of Regents is a constitutionally independent body having power to govern the University that can not be infringed by statute.

State legislature's prescription of content of biology textbooks is held unconstitutional by the state supreme court. Related to faculty power is the occasional tendency of some state legislatures to lay down rigidly what textbooks in schools and colleges may or may not contain. This can practically amount to the equivalent of dictating precisely what shall or shall not be taught, and runs counter to the concept of confidence in the discretion of faculty members in such matters, and the idea of the college as a place where freedom of teaching and learning prevail.

A Tennessee statute required that biology textbooks commenting on the origins of man must say that no such theory has a basis in scientific fact, and

41 *Cathcart* v. *Anderson*, (Wash.), 530 P. 2d 313 (1975); affirming 10 Wash. App. 429, 517 P. 2d 980.

must give equal space to more than one such theory, including, but not limited to, the Biblical thesis set forth in the Book of Genesis, and must exclude "all occult or satanical beliefs." In declaring this prescription contrary to both the federal and state constitutions, the court remarked: "Throughout human history the God of some men has frequently been regarded as the Devil incarnate by men of other religious persuasions. It would be utterly impossible for the Textbook Commission to determine which religious doctrines were 'occult' or 'satanical' without seeking to resolve the theologies through the ages. The requirement that some religious concepts of creation, adhered to presumably by some Tennessee citizens, be excluded on such grounds in favor of the Bible of the Jews and Christians represents a method of preferential treatment of particular faiths by state law, and, of course, is forbidden by the establishment clause of the First Amerndment" (42).

Individual authority in assigning grades to students is not absolute. A tenured associate professor of anthropology at the Hartford campus of the University of Connecticut had a total of 220 undergraduate students in his classes during the Spring semester of 1970. He had been on the faculty of the University since 1957. He always announced at the beginning of a semester that no student would receive academic credit until after passing a mandatory final examination. In other words, the assumption apparently was that every student was a failure unless demonstrated otherwise in the final examination. The assumption is perhaps not untypical among stiff-necked academic traditionalists and self-proclaimed upholders of "excellence," "quality," and "standards."

42 *Steele* v. *Waters*, (Tenn.), 527 S. W. 2d 72 (1975).

Immediately after the shocking tragedies at Kent State University in Ohio on May 4, 1970, and the invasion of Cambodia, leading students at the University of Connecticut, including the president of the student body, started a "student strike" at the main campus at Storrs, creating a problem for the administration and faculty as to how the academic year could best be carried through to its conclusion with justice to all concerned. (Final examinations were scheduled to begin May 18.) For the first time in thirty years, the academic senate (consisting of the president and the faculty) convened in emergency session May 8, and adopted certain emergency policies, among which were:

Instructors would not in any way penalize students for absenting themselves from classes between May 5 and May 15. Any student who so desired could take a regularly scheduled final examination which would be based only on work completed prior to May 5. Students who had a passing grade as of May 5 could elect not to take the final examination and receive instead a course grade of "S" (satisfactory), entitling them to course credit.

It turned out that 15 of the associate professor's students did not take the final examination. He, in disregard of the faculty emergency rule, marked the 15 students "abs" which would convert to an "F" unless they took a make-up examination or some similar project. None did anything of the kind, relying on the emergency rules of May 8. In November the provost of the University directed the registrar to change the 15 marks to "S", in accord with the emergency rules. Thereupon the associate professor asked the superior court of Hartford County for a mandatory injunction to enforce his grades (in the spirit of "they shall not pass"). He lost his case in the superior court, and the Connecticut supreme court affirmed that judgment.

Although the emergency rules had been adopted by voice vote, and there was some real doubt as to whether this was in conformity with a standing rule that a two-thirds vote was necessary if the senate had not been forewarned that a change in the rules would be considered, both courts agreed that the emergency rules had been lawfully adopted as a proper exercise of the delegated powers of the faculty senate.

Chief Justice House, writing for the five-member state supreme court, noted that the mandatory orders asked from the court are appropriately granted only to enforce "ministerial" duties of public employees, and not discretionary duties in which they are to exercise their best judgment; and such remedies are granted only when it appears that some person will otherwise suffer irreparable damage; and neither requisite was present here.

The court also concluded unanimously that it would not adjudicate the issue of what is or is not good educational policy, since that is best decided at the discretion of the educational authorities employed for that purpose; it would decide questions of *legality*, and found that the University's action in this matter was lawful. There was no willful and corrupt "alteration of records of a state institution" as charged (43).

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43 *Simmons v. Budde*, (Conn.), 338 A. 2d 479 (1973); certiorari denied by U. S. Supreme Court, 94 S.Ct. 1943 (1974).

The New Hampshire legislature enacted a statute authorizing state employees to engage in collective bargaining. It defined employees as "classified employees of the state, and non-academic employees (exclusive of department heads and executive officer) of the University of New Hampshire including Keene State College and Plymouth State College as defined by the board of trustees of the university. . . " The net effect was to deny collective bargaining rights to the academic employees (faculty members) of the state university system, while granting them to other state employees in general, including the faculties of the seven State Vocational-Technical Colleges.

Professors at the University asked for a declaratory judgment that the statute was unconstitutional, and a permanent injunction against its operation, claiming it violated their First Amendment right of free association, and, by discriminating as it did, deprived them of equal protection of the law. U. S. District Judge Hugh H. Bownes rejected both aspects of the plea, saying their right of association was untouched--they were as free as before to unionize to promote their ideas if they wished; but, on the elementary principle that there is nothing in the U. S. Constitution which entitles one to have a contract with another who does not want it, the state may lawfully forbid such contracts with its instrumentalities.

To support a "rational basis" for distinguishing university professors from other employees of the state, as the legislature did, Judge Bownes footnoted half a dozen *Law Review* articles in which conservative legal scholars expatiated on the merits of "shared governance" as against collective bargaining, mostly during the late 1960's, when collective bargaining

was regarded by many as a shocking aberration, to be stamped out promptly (44).

Collective bargaining contracts in New York State. Agreements resulting from formal collective bargaining sometimes contain elaborate multiple-step "grievance procedures," as, for example, in the case of the State University of New York. When certain employees of the Research Foundation of the State University sued for sums alleged to be due them under the terms and conditions of their employment, the supreme court of Kings County ordered the money paid; but this was reversed and the complaint dismissed without prejudice by the Appeallate Division. The plaintiffs had begun a grievance procedure only a few days before instituting their suit; had received an adverse determination in Step 1, and had started Step 2 (an appeal to the Chancellor of the State University) which was still pending. Since the agreed procedure also included Steps 3 and 4, the court action was premature because they had not yet exhausted the available administrative remedies.

Steps 1 and 2 could be initiated by either the grievant or the union, but steps 3 and 4 could be begun only by the union. Hence the dismissal by the Appellate Division was "without prejudice" (which leaves the door open to a new action if necessary), because it might conceivably turn out that the plaintiffs would later have a right of action against the union if it failed or refused to proceed with the matter in the agreed way (45).

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44 *University of New Hampshire Chapter of American Association of University Professors* v. *Haselton*, (U.S. D.C., N.H.), 397 F. Supp. 107 (1975).

45 *Rieder* v. *State University of New York Research Foundation*, (N.Y. App. Div.), 366 N.Y.S. 2d 37 (1975).

Another New York Appellate Division decision involved the private New York Institute of Technology. The Institute asked the supreme court of Nassau County to stay arbitration of a dispute in which the Institute had denied tenure to two plaintiff professors who had been recommended for tenure appointments by the appropriate faculty committees, and who thereafter instituted grievance proceedings. The court granted the application, but it was reversed by the Appellate Division, holding that the dispute should be allowed to proceed to arbitration because the gravamen (main weight) of the controversy concerned the interpretation of a prior document which had been made a part of the collective contract by reference; namely, the 1966 AAUP-sponsored *Statement on Governance of Colleges and Universities*, which provides that "the governing board and the president should, on questions of faculty status, as in other matters where the faculty has primary responsibility, concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail," and that the facts involved were appropriate for arbitration (46).

Justice Benjamin dissented from the opinion of his four colleagues, in a terse memorandum, the gist of which was: "The faculty committees recommended 15 teachers for tenure at the 1972-73 academic year. But for economic reasons, the president and board of trustees granted tenure only to the first 11 thus recommended." As to the plaintiff teachers, it appeared that they had not been subjected to any form of discrimination, nor to any finding of incompetence. "The loss of their positions was a consequence of budgetary restrictions. Such tenure disputes are not a subject of arbitration."

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46 *New York Institute of Technology* v. *Council of Metropolitan and Old Westbury Chapters, American Association of University Professors*, (N.Y. App. Div.), 364 N.Y.S. 2d 190 (1975).

The bargaining agent in a multi-institutional system. The Minnesota State College Board governs seven state colleges, recently renamed state universities. The institutions do not have separate governing boards. Collectively they are often spoken of as a "system"; but this kind of a "system" is not to be confused with a multi-campus university--its units are separate institutions, not branches of a parent institution, even though they are all under one governing board, and the legal effect is the same.

In January 1973 the director of the Minnesota Bureau of Mediation Services issued an order: ". . . A statewide unit of all state colleges for the purpose of negotiating conditions of employment for the faculty constitutes an appropriate unit unless challenged by more than 50 per cent of the faculty members of any individual college; . . ." Although this was issued over objections of the Minnesota Federation of Teachers and the American Association of University Professors, it was not challenged or appealed from; and an Inter-Faculty Organization started negotiations with the State College Board as bargaining representative of all the colleges.

In February 1973 a new director of the Bureau of Mediation ordered negotiations halted until an appropriate bargaining unit could be determined and the exclusive representative certified. At about the same time the Minnesota Federation of Teachers filed two petitions asking that the faculties at Moorhead State College and Southwest State College each be recognized as appropriate bargaining units, and that in both cases the MFT be certified as the exclusive bargaining representative. In August the new director revoked his predecessor's determination, and ordered that: "Separate and distinct bargaining units at each of the state colleges are the appropriate units for the faculty members employed in the State College system."

Appeal was taken to the Minnesota Public Employment Relations Board by the State College Board and four rival faculty organizations. After *de novo* hearing and receipt of briefs in mid-October, the MPERB, by a 3 to 2 vote, declared this order correct. Next appeal was to the district court of Ramsey County, where the matter came to trial in September 1974. Judge John W. Graff's judgment, entered December 11, 1974, was: "The appropriate geographical bargaining unit for members of the faculty employed at the seven state colleges is the statewide system," thus reversing MPERB. This was affirmed in a *per curiam* decision of the Minnesota supreme court, with three of the Justices not participating (47).

The decision hinged on the question of whether the faculty members were employed by their institutional presidents or by the State College Board; for the statute clearly provided that collective negotiations were to be between employees and employer. The supreme court held that "the State College Board is the appointing authority; it has merely delegated the implementation of its duties to the college presidents. . .; and such delegation is not a complete divestiture. . ." Manifestly this was legally correct (48).

Apart from the legal considerations, it may perhaps be remarked that large-scale centralization and consolidation of the employing power seems inevitably to lead to a counterbalancing centralization of the power of organized employees.

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47 *Minnesota State College Board* v. *Public Employment Relations Board*, (Minn.), 228 N.W. 2d 551 (1975).

48 Discussed in some detail at pages 1-10 in *The Colleges and The Courts: Faculty and Staff Before the Bench.*

A similar result had been reached in Pennsylvania in 1973, with regard to the system of 14 state-owned institutions known as "the 13 state colleges and Indiana University of Pennsylvania" (49); and somewhat similarly in New Jersey (50).

Various features of collective contracts in Pennsylvania and Illinois. The Community College of Beaver County in Pennsylvania, under a collective bargaining agreement with the Society of the Faculty of the College, negotiated in 1972 in accord with the Pennsylvania Public Employee Relations Act, subsequently discharged two full-time faculty members as part of a financial retrenchment program, and later hired two part-time faculty members. The Society of the Faculty claimed the College was bound under the contract to offer the part-time positions to the discharged professors. The College and the Society having reached an impasse in attempts to negotiate this point, it was then submitted to binding arbitration as presecribed by the collective bargaining agreement. The arbitrator ruled in favor of the faculty contention.

The arbitrator's award was declared erroneous and set aside by a five-judge Commonwealth Court, in an opinion written by President Judge Bowman. Three-fourths of the opinion was used to explore pertinent statutes and decisions to determine that the matter was properly within the jurisdiction of the Commonwealth Court, and not of the Court of Common Pleas. The sole issue on the merits was adjudged to be

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49 *Pennsylvania Labor Relations Board* v. *State Colleges and Indiana University of Pennsylvania*, PLRB Case No. C-1986-C, January 17, 1973.

50 *Association of New Jersey State College Faculties, Inc.* v. *Board of Higher Education*, 112 N. J. Super. 237, 270 A. 2d 744 (1970).

whether the terms of the collective contract embraced part-time faculty members in any sense, and the decision was that they did not. The exact words were: "The terms and conditions of this agreement do not apply to those employed under special term appointments." Thence it was rationalized, with logic that may not seem entirely unquestionable, that the discharged full-time professors could assert no claims of priority for reappointment to new part-time appointments (51).

In a series of decisions of an Illinois Appellate court in 1974 in litigation between the Cook County (Chicago) Federation of College Teachers and the Board of Trustees of the city junior college district (which operates an eight-campus community college called Chicago City Colleges, several issues in collective bargaining were dealt with.

(1) Illinois has a uniform arbitration law, but if an arbitrator is used in case of impasse in a collective bargaining dispute, he has no authority to require a college to employ anyone as a teacher, or to award any position in the employ of a college to anyone. This power is a non-delegable power of the governing board of the college.

(2) Promotion of teachers in the employ of the college belongs exclusively to the governing board, directly delegated to it by the legislature.

(3) Involuntary transfers of faculty members from one campus to another are within the authority of the governing board unless prohibited by the collective agreement currently in force. Where the

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51 *Community College of Beaver County* v. *Society of the Faculty*, (Pa. Comwlth.), 331 A 2d 931 (1975).

complaint concerned three involuntary transfers that had subsequently been rescinded, and a newly-executed collective contract provided for a moratorium on involuntary transfers during the term of its existence, the court declared the case moot and made no decision, for lack of a controversy.

(4) Where the collective contract stipulated that some teachers would be allowed to do extra work for extra pay, but did not provide that any must necessarily be given such work during the summer, certain teachers complained of being passed over during the summer, and an arbitrator awarded them back pay in consequence. His award was erroneous, and no teacher could be given back pay for work he had not performed. That would be tantamount to a gift of public money prohibited by the state consitution (52).

Faculty strike at Lake Michigan Community College. Lake Michigan Community College at Benton Harbor, Michigan, had a collective bargaining contract with the Michigan Federation of Teachers for the academic year 1967-68 (said to have been "imposed" upon the board of trustees by arbitrators). Subsequent new agreements were reached for each of the next two succeeding academic years, and for a period of a little less than two years expiring in August 1972. The union (MFT) initiated negotiation for a new contract as early as December 13, 1971, but the college trustees responded only slowly and reluctantly. Approximately 16 bargaining sessions were held between February 8 and August 8, 1972, without resolving the issues of salaries or the duration of the new contract. The union

52 Four cases with itentical captions: *Board of Trustees of Junior College District No. 508, County of Cook, State of Illinois* v. *Cook County College Teachers Union, Local 1600*, (Ill. App.), 318 N.E. 2d at pages 193, 197, 200, and 202 respectively (1974).

reduced its salary demands by $400, but the college trustees "stonewalled" for a total "freeze" of all salaries at the level of the then current year, with no change.

Later in August the college requested mediation and the state sent a mediator with whom sessions were held without much result. Still later the union requested a fact-finder, and one was appointed. He issued his report January 11, 1973, including a recommendation that the regular salary grid be increased by 5.5 per cent. This was accepted by the union but rejected by the college. (At the time, inflation was rampant, and federal wage-and-price controls limited salary increases to 5.5 per cent.) The college then offered salary increases for the year subsequent to the proposed first contract year, but held to the "freeze" for the first year; and insisted that the regular salary grid be eliminated altogether. This was tentatively accepted by the union negotiators but was rejected by vote of the union membership February 8, 1973. On February 14 the union filed charges of unfair labor practices with the Michigan Employment Relations Commission; and the next day called a strike in which at least 40 teachers participated.

The college, after giving the striking teachers a written warning, notified all of them in writing that their services were terminated on March 6, 1973; and proceeded to hire replacements. These events led to two distinct lines of litigation.

On March 19 a hearing was held by an administrative judge on the charges of unfair labor practices, and he reported on July 2, concluding that the college "has fulfilled its bargaining obligation. What it has engaged in is no more than hard bargaining," and recommending to the MERC that the charges be dismissed. MERC issued its unanimous decision to that effect

February 25, 1974. This was appealed to the Michigan Court of Appeals and there affirmed in a decision dated April 28, 1975 (53).

(2) The union, to allay economic hardships suffered by its striking members who had been discharged in March 1973 and their families, asked U. S. Chief District Judge Noel P. Fox for a temporary restraining order to reinstate them, and for a judgment of compensatory damages. The college's motion for convening a special three-judge court was granted, but that court, by a vote of 2 to 1 (with Judge Fox dissenting) decided no federal question was involved, and dissolved itself, leaving the case for Judge Fox in his capacity as a one-judge court. He then issued the restraining order; but on appeal it was vacated and remanded by the U. S. Court of Appeals (480 F. 2d 927). For his decision after remand, Judge Fox wrote a remarkable opinion of some 25,000 words explaining his doubt that the work stoppage by the teachers was actually an illegal strike, and his doubt that the college board of trustees was sufficiently impartial in the circumstances to determine that question fairly. He ordered that no more administrative hearings be held on the legality of the strike, and that the college trustees file within thirty days an action in the local circuit court of Michigan seeking a declaration that the discharged teachers were illegally on strike within the meaning of the Michigan public employment relations statutes. He retained jurisdiction for the U. S. District Court (54).

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53 *Lake Michigan Federation of Teachers* v. *Lake Michigan College*, (Mich.App.), 231 N.W. 2d 538 (1975).

54 *Lake Michigan College Federation of Teachers* v. *Lake Michigan Community College*, (U.S.D.C., Mich.), 390 F Supp. 103 (1974).

Judge Fox's learned, sensitive, and thoughtful opinion cannot be adequately digested here. He forthrightly believed the college trustees had acted "intransigently and provocatively" in spurning the fact-finder's report, and at other points during the negotiations. Noting the current inflation, he pointed out that refusal to consider moderate salary increases would reduce the economic status of the teachers and cause hardships; the community college district was not financially impoverished, but amply able to pay salaries commensurate with the then current wage-and-price controls. So provocative, he suspected, were the board's actions that they must be characterized as "violent, if not barbaric," and added a footnote in the form of a quotation from Courtney Murray, S.J., an eminent philosopher and exponent of ethics: "Barbarism is not, I repeat, the forest primeval with all its relatively simple savageries. Barbarism has long had its definition, resumed by St. Thomas after Aristotle. It is the lack of reasonable conversation according to reasonable laws. Here the word 'conversation' has its two-fold Latin sense. It means living together and talking together" (55).

Press accounts of late June 1976 reported that the U. S. Supreme Court, by a 6-3 vote had upheld the right of the board of education at Hortonville, Wisconsin, site of a walkout of 85 teachers in 1974, to discharge the teachers for participating in a strike illegal under Wisconsin law (56). Justice Potter Stewart, one of the three dissenters, was quoted as having written in his opinion: "There is a constitutionally unacceptable danger of bias where school-board members are required to assess the reasonableness of their own actions during heated contract

55 At page 18 in Murray's *We Hold These Truths*. New York: Sheed and Ward, 1960.

56 *The Chronicle of Higher Education* 12, No. 16: 3 (June 28, 1976).

negotiations that have culminated in a teachers' strike." He would not have nullified the discharges, but would have remanded the case to the Wisconsin supreme court, which, he said, had "not clearly delineated the state law criterion that governs the discharge of striking teachers."

11. NON-ACADEMIC STAFF MEMBERS

The University of Washington at Seattle conducts oceanic research, using a seagoing vessel for the purpose. Between 1961 and 1965 the work was done by a small ship, the *Brown Bear*. In 1961 a ship's officer was hired temporarily as first officer of the *Brown Bear*, and in 1964 he became that ship's captain. During those years the position was in the classified civil service under the State Civil Service Law of 1961. In 1965 the Board of Regents of the University, in accord with its statutory authority to exempt from civil service such positions as were connected with research, formally exempted two such positions in the department of oceanography: that of the marine superintendent of the department and that of master of the research ship. Later in the same year it received delivery of a new, larger, and better-equipped research vessel; retired the *Brown Bear*, and assigned her captain as master of the new vessel.

In 1970 the Regents terminated the captain's services without regard to the rules of the classified civil service (the record does not provide the reason for this action). He appealed to the State Higher Education Personnel Board, which decided against him; *i.e.*, that his position was properly exempted, and that he had no recourse to civil service rules. By statute, decisions of the Higher Education Personnel Board are final. The local Superior Court of King County affirmed the foregoing; and the state supreme

court, by a vote of 5 to 3, did likewise (57). It was held that the Regents had no affirmative duty to notify the captain that he was passing from a classified position to an exempted position when he was promoted to be master of the new and larger ship.

Chief Justice Hale wrote a dissenting opinion in which Justices Hunter and Wright concurred. They said: "That the captain was deprived of his civil service status through an arbitrary and capricious act of purported classification is apparent from this record." They were disturbed that: "The statement of exemption does not purport to exempt all ships' masters employed by the University, nor the masters of particular ships above a given length, or beam, or tonnage, or horsepower. . . nor set forth any other criteria upon which a reasonably prudent ship's master employed by the University could take notice that there existed some logical basis in fact for classifying one ship as a civil service ship and another as a non-civil service ship." In this view, the job was identified only as master of the *R. V. Thompson*, the new ship. If, while the captain was in command, these justices thought, the University had merely changed the name of the vessel, "that simple act of ceremonial dedication would have restored the captain to full civil service status instanter, with all of the rights, privileges and powers thereunto appertaining."

12. THE PRESIDENT; ADMINISTRATIVE STAFF; BOARD MEMBERS

Administrative officers in universities and colleges are not tenured in their administrative posts, but generally they serve under contract for a fixed term, sometimes as long as three years or five years. In some instances they serve at the pleasure of the governing board.

57 *Wyatt* v. *University of Washington*, (Wash.), 523 P. 2d 910 (1974).

58 - FACULTY AND STAFF BEFORE THE BENCH

At Prairie State College, a public community college at Chicago Heights, Illinois, the president was under a contract which had two more years to run when he was suddenly discharged by the board in the summer of 1970. The board's attorney first orally offered him the option of resigning or being "fired," and ten days later the board met to deliberate on the matter, without giving him any written specification of charges, for which reason he refused to attend. At that meeting the board discharged him; and at the different judicial levels there was later much argument on the issue of whether he was entitled to notice and a hearing, or whether he waived any such right by refusing to attend the meeting without a specification of the charges against him.

Parenthetically it may be noted that boards in similar situations sometimes keep out of court by "buying off" the employee's contract; that is paying him his salary of the remainder of the contract term. This might have cost the district some such sum as $50,000, but it might have been a relatively economical step in view of the extensive litigation which followed. Six years later the case had not been settled, after being twice in the U. S. District Court, twice in the Seventh Circuit U. S. Court of Appeals, and once on an unsuccessful attempted appeal to the U. S. Supreme Court.

It appeared that the trigger of the controversy was publication in the college newspaper of a memorandum by the president which was highly critical of the ethnic studies program in the college. He had intended it to be confidential, for distribution only to specified members of the staff and faculty; but someone "leaked" it to the paper. This angered the board members, of whom at least a majority disagreed with him on the subject. One may see here, perhaps a faint or remote parallel to the case of *Pickering* (discussed

at pages 125-127 in *Faculty and Staff Before the Bench*). This probably encouraged the president to plead that his discharge was in retaliation for his lawful exercise of free speech. U. S. District Judge Austin dismissed the suit, however, believing that the interest of the state requires that the personal relations between a governing board and its college president be harmonious, and that a discharged president can not interpose, against that interest, either the issue of free speech or of right to a hearing (58).

The Seventh Circuit U. S. Court of Appeals reversed this and remanded the case for trial on the merits (59). At this point the board appealed to the U. S. Supreme Court, which declined to review (60).

The trial on the merits occurred in 1973, and Judge Austin's judgment was against the president--holding that he had not proved any violation of his freedom of speech or his right to a fair hearing (61). The president appealed again to the Seventh Circuit, which disagreed with the District Court on the issue of a fair hearing--saying the original offer of a hearing was vitiated by the fact that the board had already hired a successor to the president whom it intended to discharge. Moreover, since his contract had two more years to run, he had a sufficient "property interest" to require that he be given notice and hearing prior to discharge. (This would seem to be sound law of long standing.) Furthermore the Circuit

58 *Hostrop* v. *Board of Junior College District No. 515*, (U.S.D.C., Ill.), 337 F. Supp. 977 (1972).

59 *Hostrop, etc.*, reversed and remanded in (U.S. C.A.,Ill.), 471 F. 2d 488 (1972).

60 *Hostrop, etc.*, 411 U.S. 967, 98 S.Ct. 2150 (1973).

61 *Hostrop, etc.*, (U.S.D.C.,Ill.), 399 F. Supp. 609 (1974).

Judges decided that the board must compensate the president for depriving him of his right to a fair hearing, and directed the District Court to determine the amount of damages (62).

As of early 1976 the District Court's judgment had not been published, although nearly six years had elapsed since the inception of the controversy at Prairie State College.

In the foregoing case none of the board members was held personally liable for infringing the rights of the president; any damages were to be paid by the junior college district.

Regarding board members, there is an incipient change of judicial attitudes toward those who play fast and loose with the civil rights of students, faculty members, or other staff members. Formerly such lapses were uniformly treated as "honest mistakes of judgment" for which the board member would not be held personally liable to the injured party. There are already several federal decisions which veer sharply to the contrary. As early as 1969 both the chairman of the board and the president of Northern Virginia Community College at Alexandria were ordered to pay an unjustly discharged professor of police science $20,000 as punitive damages (pages 167-168 in *Faculty and Staff Before the Bench*).

Then there is, among others, the 1975 case at Brookdale Community College in New Jersey, in which an unjustly discharged teacher of journalism was awarded $10,000 punitive damages against the president and each of the six trustees who voted for her unlawful dismissal (recounted in Section 8 herein).

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62 *Hostrop, etc.*, (U.S.C.A., Ill.), 523 F.2d 569 (1975).

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